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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FLAVIO CORNEJO PUIG-MIR,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

MIKE DeGEURIN
FOREMAN, DeGEURIN & NUGENT
909 Fannin, Suite 690
Houston, Texas 77010
(713) 655-9000

Counsel of Record for Petitioner

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTIONS PRESENTED

I.

Does *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988), as applied here, misinterpret *Ross v. Oklahoma*, 487 U.S. 81, (1988)?

II.

Does the three-part test of *United States v. Sanchez*, 988 F.2d 1384 (5th Cir. 1993), as applied here, conflict with *Smith v. Illinois*, 390 U.S. 129 (1968)?

LIST OF ALL PARTIES

1. Flavio Cornejo Puig-Mir, Defendant-Petitioner.

2. The United States of America, Plaintiff-Respondent.

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PETITION FOR WRIT OF CERTIORARI

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW FLAVIO CORNEJO PUIG-MIR, Petitioner herein, by and through his attorney, Mike DeGeurin, and pursuant to rule 12, files this petition for writ of certiorari and in support thereof, would show the court as follows:

LOWER COURT'S OPINION

The opinion of the Court of appeals for the Fifth Circuit was not designated for publication. The full text of the opinion is reproduced in the Appendix.

BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on November 17, 1993.

B. No motion for rehearing was filed.

C. Petitioner asks this Court to review a final judgment of a court of appeals of the United States. Therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

D. This petition is timely if filed on or before February 15, 1994.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Fifth Amendment to the United States Constitution reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation (emphasis added).

The Sixth Amendment to the United States Constitution reads:

In all criminal prosecutions, *the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (emphasis added).

STATEMENT OF THE CASE

The petitioner, Flavio Cornejo Puig-Mir, was charged in a three-count indictment with the offenses of Money Laundering and Conspiracy to Commit Money Laundering. At a trial in the United States District Court for the Southern District of Texas, Houston Division, the primary contested issue was whether the petitioner was entrapped by Government agents and their paid associates who set up a "sting" operation, called "Operation Scorpion," aimed at money-laundering suspects. Viewed in the light most favorable to the verdict, there was sufficient evidence that the petitioner played some role in certain money-laundering activities conducted by Operation Scorpion, but whether or not the petitioner was induced to do so by Government operatives largely depended on whether the jury believed the petitioner, who testified in his own defense, or whether the jury believed a paid Government operative who called himself "Jay Zaden," though that was not his real name.[1] The jury was charged on the issue of entrapment and resolved it against the petitioner, finding him guilty on all counts. Thereafter a presentence report was prepared, and the trial court assessed punishment at confinement in a United States penitentiary for a period of sixty months on the

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[1]The name appears as both "Zaden" and "Zayden" in the record, and even as "Zaiden" in one document. It does not really matter which is used, as all variations on the name are false.

first two counts and for a period of 151 months on the third count, with an additional period of post-release supervision required. The petitioner gave notice of appeal.

On November 17, 1993, in a per curiam opinion, a panel of the Court of Appeals for the Fifth Circuit affirmed the conviction. Among the appellate contentions rejected by the Court of Appeals were the petitioner's claim that the trial court erred in dismissing a venire member *sua sponte* and his claim that the trial court erred in prohibiting cross-examination of Jay Zaden inquiring about his real name, his criminal background, and the full extent of his service as a paid agent of the Government.

THE FEDERAL COURT JURISDICTION

The United States District Court had jurisdiction over the indictment, which accused the petitioner of violating 18 U.S.C. §§ 2, 371 and 1956(a)(1)(a). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and Fed.R.App.P. 4(b).

REASONS FOR REVIEW

The petitioner submits that the writ of certiorari should be granted as to two issues decided against the petitioner in the trial court and in the Court of Appeals. As to each issue a significant question arises as to whether the reasoning used by the Court of Appeals is in harmony with decisions by this Court.

REASONS FOR REVIEW OF QUESTION ONE

Does *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988), as applied here, misinterpret *Ross v. Oklahoma*, 487 U.S. 81 (1988)?

The petitioner submits that the trial court erred in excusing venire member Cynthia Weiss on the court's own motion, to which the petitioner timely objected. The thrust of the trial court's concern with Ms. Weiss was that she could not be fair and impartial, based on her feelings about a state court prosecution of her son (R. V- 39-4).[2] On questioning by defense counsel, however, Ms. Weiss indicated that she could vote for a guilty verdict if the Government proved its case. The petitioner believes the trial court's *sua sponte* exclusion of Ms. Weiss was an abuse of discretion.

The petitioner argued on appeal that this was error, in that the record did not show that Ms. Weiss had a bias that would interfere with her function as a juror. The Court of Appeals approached the issue by assuming *arguendo* that the trial court's decision was erroneous, although noting the large measure of discretion that trial courts have in the jury selection process.[3] Even if the trial court erred, the Court of Appeals reasoned, the petitioner failed to prove that he was harmed. For this conclusion the Court of Appeals relied on the Court of Appeals' earlier decision in *United States v. Prati*, 861 F.2d 82 (5th Cir. 1988). The petitioner believes the decision in *Prati* and the decision in this cause were erroneous because the rationale of *Prati* was a misinterpretation of this Court's decision in *Ross v. Oklahoma*, 487 U.S. 81 (1988).

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[2]The record is designated herein "R.," with Roman numerals for volumes and Arabic numbers for pages. Because more than one court reporter participated, there is some repetition of page numbers.

[3]The trial court's decision is reviewed according to an "abuse of discretion" standard of review. *United States v. McCord*, 695 F.2d 823, 828 (5th Cir. 1983).

In *Ross v. Oklahoma* the trial court denied a defense challenge for cause. As a result, Ross' counsel was forced to utilize a peremptory challenge to exclude that particular venireman. Because peremptory challenges are limited in number, the use of a peremptory challenge to "cure" trial court error in denying a challenge for cause can mean, if all other defense peremptories are exhausted, that the error in denying a challenge for cause shorts the defendant one peremptory challenge which he could have used to keep someone else off the jury panel. It was in that context that this Court concluded that Ross could not demonstrate harm unless he objected to the actual jury. Since criminal verdicts must be unanimous, it should have been enough for Ross to show a valid basis for objection to even one actual juror, but Ross failed to do that.[4] The loss of a peremptory challenge, by itself, was considered an insufficient basis for reversal on constitutional grounds because the right to peremptory challenges was not of constitutional dimension.

Prati purported to apply *Ross v. Oklahoma*, but it involved an entirely different situation. To begin with, *Prati* involved a federal prosecution, a fact which should have avoided the concern in *Ross* as to whether a state's peremptory challenge provision was of constitutional dimension. Second, in *Prati* the Government was given the benefit of a challenge for cause against a venireman who should have been subject only to a peremptory challenge. The net effect was the equivalent of giving the Government an extra peremptory challenge, which in turn gave the

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[4]The Texas Court of Criminal Appeals applies a similar test, which requires a defendant who alleges error in denial of a challenge for cause to exhaust his peremptory challenges, unsuccessfully request additional peremptory challenges, and identify an "objectionable" juror or jurors seated as a result. *See Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986), *cert. denied* 482 U.S. 920 (1987).

Government a distinct advantage in tailoring the jury to its liking. *Prati* nevertheless held that Prati had to show that the actual jury was objectionable. In this *Prati* erred.

Unlike the consumption of a defense peremptory challenge, which was the issue in *Ross*, the evil in *Prati* and the evil in this cause cannot possibly be cured by either (a) requesting additional defense peremptory challenges or (b) identifying some other potential juror as being subject to challenge for cause or being "objectionable." In fact there is nothing a defendant can do to cure it, for once excluded the potential juror is gone. The harm lies in allowing the Government to bend the rules in excluding potential jurors it does not want but the defendant does want. The defendant is denied an equal opportunity to participate in selecting the jury which will decide his fate. Thus *Prati* was incorrect in taking the harmless error principle from *Ross* and applying it in a significantly different context. It may be that this type of error can occur and the remaining jurors still will constitute an "impartial jury" for purposes of U.S. CONST. amend. VI, but the process prescribed for jury selection nevertheless has been altered to give the Government an improper advantage.

In this cause the Government did not initiate the removal of Ms. Weiss, who was removed by the trial court *sua sponte*, but the removal was over objection by defense counsel. The trial court seemed to be concerned that Ms. Weiss would be biased against the Government. The Court of Appeals likewise treated the *sua sponte* removal as the functional equivalent of a Government challenge. Thus this cause provides an appropriate vehicle for determining whether *Prati* was wrongly decided.

Regarding the standard which applies to exclusion of a venireman *sua sponte*, a distinction is found in 28 U.S.C.

§1866(c)(2) and 28 U.S.C. § 1866(c)(4), the former providing that a juror "may be excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a potential juror would be likely to disrupt the proceedings," while the latter provides that a juror may be excluded "pursuant to the procedure specified by law upon a challenge by any party for good cause shown." One circuit has suggested that it is a distinction without a difference, in that "unable to render impartial jury service" and "good cause" amount to the same thing in this context. *United States v. Calabrese*, 942 F.2d 218, 222-223 (3rd Cir. 1991).

The test should be a bias which would impair a potential juror's service as a fair and impartial juror. Voir dire begins with a presumption that a prospective juror is impartial. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The question then becomes whether the venire member's answers rebut that presumption of impartiality. The petitioner believes the trial court erred in its assessment of that question, but it is not really necessary to determine that for present purposes, in that the Court of Appeals assumed *arguendo* that the trial court erred and disposed of the issue on the basis of the legal principle set forth in *Prati*, as the Government's brief urged.

A more suitable approach to erroneous Government challenges for cause, or erroneous *sua sponte* removal of veniremen by the trial court, can be distilled from a number of prior decisions by this Court. Instead of taking the approach used in *Ross v. Oklahoma*, which was a capital case, other capital cases like *Davis v. Georgia*, 429 U.S. 122 (1976) and *Adams v. Texas*, 448 U.S. 38 (1980) have held that the erroneous exclusion of even one venireman upon Government challenge merits reversal, regardless of the eventual makeup of the actual jury. *Prati*, *supra* at 87, further held that the jury selection process in non-capital

federal criminal cases is not subjected to the same level of scrutiny as is used in capital cases with respect to a venireman's opposition to the death penalty. This Court should overrule *Prati* on that point as well. The petitioner urges three reasons why this Court should take that step:

1. *Prati* reached that conclusion in a footnote which followed a textual reference to a judicial ruling which was characterized as an "unintentional mistake," based in part on a lack of vigilance by defense counsel. Therefore any statement in *Prati*, in a footnote or otherwise, which would set precedent as to reasoned rulings by the trial court, such as the dismissal here, was beyond the scope of what needed to be decided in *Prati*.

2. The petitioner agrees with *Prati* that the severe consequences of capital cases call for a high degree of appellate scrutiny with respect to the voir dire process, but that in no way implies that non-capital jury selection is so unimportant that a more lax standard of review should apply. Nothing in either *Ross* or in *Gray v. Mississippi*, 481 U.S. 648 (1987) so holds, or even so implies, as to federal non-capital criminal trials. Federal district courts ought to operate under the highest standards of fairness, particularly where the participation of citizens in the jury process is concerned.

3. At least one other federal circuit has looked to this Court's capital voir dire jurisprudence as precedent in non-capital cases. *United States v. Salamone*, 800 F.2d 1216 (3rd Cir. 1986).

Because the *Prati* misconceptions concerning jury selection potentially affect a large number of cases, and because *Prati* misinterpreted this Court's *Ross* decision and expanded upon it erroneously, this Court should grant certiorari on this issue.

II.

REASONS FOR REVIEW OF QUESTION TWO

Does the three-part test of *United States v. Sanchez*, 988 F.2d 1384 (5th Cir. 1993), as applied here, conflict with *Smith v. Illinois*, 390 U.S. 129 (1968)?

The petitioner also maintains that the trial court erred in failing to require disclosure of certain background information concerning Jay Zaden. In response to the Government's assertion that Zaden's safety could be jeopardized, the trial court refused to require that Zaden's real name, details of a prior conviction, and the details of his prior paid activities as a Government informant be disclosed.

As stated before, the Government's case revolved around the activities of a "sting" operation aimed at money-laundering activities. The key player in this operation was Zaden, who assumed the role of an owner of Caribe Export/Import, a dummy firm set up in a Houston suburb by the Government. Zaden held out Caribe to the petitioner as being a "front" for money-laundering operations. By the petitioner's own admission, he eventually agreed to participate in money-laundering activities with Zaden through Caribe. The real dispute was whether, as the petitioner said, the petitioner was entrapped, or whether, as Zaden said, Zaden and his colleagues simply were successful in

connecting with an established money-laundering organization in which the petitioner was a participant.

Zaden admitted that "Zaden" was not his real name. For his role in this investigation, Zaden was paid $54,000 by the United States Customs Service (R. VI-180). He said he had twice before been paid by the Customs Service, "two amounts of $2500" (R. VI-180-181). Zaden also admitted that he had a misdemeanor theft conviction (R. VI-180). It was shown on cross-examination that Zaden was arrested another time for "price tag switching" in Houston, but federal agents interceded and got the local district attorney to drop that case.[5]

When the petitioner tried to explore the nature of Zaden's prior undercover work for the Customs Service, the trial court at first was supportive, recognizing that it could "show the potential bias the witness may have" (R. VI-185). The prosecutor argued that "too much personal detail about him would cause safety problems for him," though the prosecutor admitted that Zaden was not involved in any ongoing undercover operation at that time (R. VI-186). The trial court then examined a five-page affidavit by Zaden and an NCIC record, as well as talking to Zaden *in camera* (without the petitioner or his counsel present). This review disclosed some prior criminal conduct not acknowledged the day before. It also showed that Zaden acted as a paid confidential informant to the Drug Enforcement Administration in 1984, for which Zaden received between

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[5]The trial court commented that this offense was essentially "shoplifting." That is not correct. This offense does not merely involve the physical act of taking merchandise out of a store, such as might occur on the spur of the moment, but is a deliberate deception involving two acts of removing tags, plus the act of lying to a store clerk with a straight face.

$40,000 and $50,000. The petitioner was not allowed to pose cross-examination questions addressing those topics. The written material considered by the trial court was sealed for the appellate record.

The petitioner's counsel timely objected to the trial court's denial of access to the information, arguing that nondisclosure violated the petitioner's right of confrontation under U.S. CONST. amend. VI. The petitioner correctly cited *Smith v. Illinois*, 390 U.S. 129 (1968), as the case which should be controlling here. In *Smith*, as here, there was conflicting testimony from a Government witness using a false name and a defendant as to crucial matters for which there was no third-party witness. A prosecution objection was sustained when Smith sought to elicit this witness' true name and his residence address. After recognizing that cross-examination was an indispensable part of the constitutional right of confrontation, *Smith* wasted little time in finding reversible error:

> [W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth"[6] through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Working in tandem with the Sixth Amendment in this context is the Fifth Amendment concept of due process of law.

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[6]Here *Smith* quoted from *Pointer v. Texas*, 380 U.S. 400 (1965).

Giglio v. United States, 405 U.S. 150 (1972), calls for disclosure of potential impeachment information. The Fifth Circuit recognized in *United States v. Dula*, 989 F.2d 772, 775, n. 7 (5th Cir. 1993), that disclosure of *Giglio* material is part of due process of law, as guaranteed by U.S. CONST. amend. V.

The Government and the trial court treated the issue in this cause as being analogous to disclosure of an informant, even though Zaden was much more than an informant in this cause. Pursuant to that approach, the parties and the trial court debated the proper application of *Roviaro v. United States*, 353 U.S. 53 (1957), and its progeny to this situation. The Court of Appeals analyzed the issue in terms of the three-part test for disclosure of an informant's identity set forth in *United States v. Sanchez*, 988 F.2d 1384 (5th Cir. 1993). It did so in a rather peremptory manner, however, stating that the Fifth Circuit panel had reviewed the *in camera* testimony and affidavit and agreed with the trial court. To this day the petitioner has never learned the contents of the *in camera* presentation.

The petitioner believes this Court needs to examine this issue for three reasons. First, the petitioner submits that primary guidance when dealing with a witness, such as Zaden, should come from *Smith v. Illinois* rather than from "informant" jurisprudence. *Roviaro* and its progeny were primarily concerned with protection of "confidential" informants. Where, as here, an informant actually serves extensively as an undercover operative, then testifies in court as a witness, the concern for confidentiality of such a witness' identity and background are less compelling than in

a *Roviaro* situation.[7] This cause is at the crossroads where *Smith* doctrine and *Roviaro* doctrine meet, and this Court ought to determine what the limits on cross-examination should be, if there should be any at all.

Second, this Court should determine whether the three-part test adopted in *Sanchez* is an appropriate standard. The petitioner disagrees with part of the *Sanchez* standard, although other parts of it are sound. *Sanchez*, *supra* at 1391 began by recognizing that there are interests on both sides which must be balanced, and that an informant's privilege from disclosure "must not override defendants' rights to due process in criminal cases." *Sanchez* listed three limitations on the *Roviaro* privilege, the first two of which are not germane here. Most of the discussion in *Sanchez* concerned the third limitation, which also applies here:

> The final consideration rises to constitutional magnitude: If the privilege interferes with a defendant's due process right to prepare his defense or if disclosure of the informant or his communication is essential to a fair determination of the defendant's guilt or innocence, the privilege must give way. *Roviaro*, 353 U.S. at 62, 77 S.Ct. at 628. The key to this consideration turns upon whether the disclosure of the informant's identity or his communication is relevant and helpful to the defendant. [Three citations.]

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[7]When this Court proposed a rule to be called "Fed.R.Evid. 510(c), Identity of Informer," it created a specific exception to the privilege "if the informer appears as a witness for the government." That rule has not been adopted by Congress, but it does shed some light on what ought to be the applicability of *Roviaro* in this context.

> This Court has developed a three-part test to determine whether disclosure of the informant's identity or communication is required. The Court examines 1) the informant's degree of involvement in the crime, 2) the helpfulness of the disclosure to the defense, and 3) the Government's interest in nondisclosure. *United States v. Vizcarra-Porras*, 889 F.2d 1435, 1438 (5th Cir. 1989), *cert. denied* 495 U.S. 940, 110 S.Ct. 2191, 109 L.Ed.2d 520 (1990) (citing *United States v. Toro*, 840 F.2d 1221, 1232 (5th Cir. 1988)). *Id.*, at 1391 (emphasis in original).

Sanchez, *supra* at 1392 suggested that a defendant must "produce evidence" on the second prong, i.e. "helpfulness" of disclosure to the defense. That language should be disavowed because it was not necessary to the reasoning in *Sanchez*, where the second prong was resolved on the basis of what the record showed would be the likely adverse effect of the informant's testimony. Moreover, the "produce evidence" language in *Sanchez* creates an impossible burden in cases like this one. The appellant thinks the better view is that found in *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993), that "for prophylactic reasons at least" the Government, not a defendant, should have the burden on the matter of adequacy of disclosure under *Giglio*, including impeachment evidence, which is what the second *Sanchez* prong really concerns. The petitioner cannot prove that revelation of Zaden's true identity would have led to beneficial cross-examination, but that proof is unavailable precisely because the appellant was not even given the information which *Smith v. Illinois* said was a necessary starting point.

Third, if this Court adopts the *Sanchez* approach, with or without the second prong, it should determine whether the trial court's decision was justified here within that framework. On this matter the petitioner is at an enormous disadvantage in disputing the lower courts' decisions because those decisions were made behind closed doors. Nevertheless, the petitioner thinks that what is shown in the record indicates that a proper application of the *Sanchez* framework would support the view that the requested disclosures should have been made. Briefly summarized, the petitioner would apply *Sanchez* as follows:

(1) Zaden's involvement in the crime was integral. Had it not been for the arrangements made by Zaden with the appellant, there would have been *no* participation by the petitioner in this particular money-laundering project. *Sanchez* points out that the identity of a "mere tipster" need not be disclosed, but Zaden was at the other end of the spectrum.

(2) While *Sanchez* was able to conclude that disclosure would not have helped Sanchez because the informant's putative testimony, if offered, would be damaging, this cause presents a different situation. Here Zaden did take the stand as the Government's witness, and the damaging testimony already had been brought forth. There is always a risk that cross-examination turns out to be counterproductive, but it is the job of defense counsel, not the prosecutor and judge, to make the decision whether to take that risk.

(3) Although the Government asserted that Zaden's safety would be compromised by disclosure, such an *ipse dixit* should not be accepted at face value. The Government always will make that assertion in these situations, as it has done at least since the prosecution of

Roviaro himself. Furthermore, if Zaden was fearful for his safety, is it likely he would repeatedly throw himself into such cloak-and-dagger activities? If some unspecified gangsters, Colombian or otherwise, really wanted to harm Zaden, simply following him home from the federal courthouse would be a more likely method than starting with information about his identity.

Smith v. Illinois, *supra* held that harmless error analysis was unnecessary because "no amount of showing of want of prejudice would cure" a denial of crucial cross-examination, but this Court retreated from that view in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The petitioner believes *Smith* represented the better view, in that harmless error analysis is unworkable when it depends on speculation as to what information was kept from the jury by the court's ruling, let alone speculation as to the relevant weight of that evidence. Moreover, the Government, as beneficiary of the error, should have the burden of proof on this matter. Nevertheless, the petitioner thinks reversal is merited even under *Van Arsdall* because the harm was evident here. The whole case really turned on credibility, and the petitioner's purpose in seeking the withheld information obviously was to determine whether other means of impeaching Zaden's credibility were available. Further impeachment of Zaden could have had a profound impact on the outcome in this cause. Because the information was withheld from the petitioner, the appellant cannot prove from the record what course the possible impeachment would have taken, but any inadequacy of the record in that respect is precisely because of the very evil the petitioner is complaining about here.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari in this cause.

Respectfully submitted,

Mike DeGeurin
FOREMAN, DeGEURIN & NUGENT
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655-9000
Texas Bar No. 05673500
Federal Bar No. 3558

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 17 1993
CHARLES R. FULBRUGE III
CLERK

No. 92-2423
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

VERSUS

FLAVIO CORNEJO PUIG-MIR,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CR-H-91-163-01)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

Flavio Cornejo Puig-Mir ("Cornejo") appeals his conviction of, and sentence for, conspiracy to commit money laundering, in violation of 18 U.S.C. § 371, and aiding and abetting money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a) (1) (A). Finding no error, we affirm.[1]

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[1] Local Rule 47.5.1 provides: " The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Cornejo and several codefendants were indicted and charged with one count of conspiracy to commit money laundering and two counts of aiding and abetting money laundering. Cornejo was convicted on all three counts. The district court sentenced him to sixty months' imprisonment on count one and 151 months on each of counts two and three.

II.

A.

Cornejo argues that the district court reversibly erred in dismissing a venireman *sua sponte*. Cynthia Weiss was questioned by the district court about her ability to be impartial. Her son had been convicted of trafficking cocaine, and she did not feel that he received fair treatment by the prosecutors or law enforcement personnel. The court asked Weiss whether she could put her son's conviction out of her mind and base her decision solely upon the evidence. Weiss responded that she was not sure that she could.

Defense counsel attempted to rehabilitate Weiss, but the district court excused her for cause. Cornejo's counsel objected "for the record" but did not state any specific ground.

On appeal, Cornejo argues that the court did not have cause to excuse Weiss and that he was injured by this action because it allowed the prosecution an additional peremptory challenge. Cornejo does not question the impartiality of the jury.

Assuming *arguendo* that the district court did err,[2] the error does not warrant reversal of Cornejo's conviction. In *United States v. Prati*, 861 F.2d 82, 87 (5th Cir. 1988), We held that "although the improper removal of the venire member may have altered the ultimate composition of the panel, this is not a ground for reversing the defendant's conviction." This conclusion was based upon the reasoning that "peremptory challenges are a means to the end of achieving an impartial jury and 'are not of constitutional dimension.'" *Id. (footnote omitted)*. Absent a challenge to the jury's impartiality and an assertion that his rights were prejudiced, Cornejo cannot prevail on this issue.

B.

Cornejo argues that the district court erred in admitting tape-recorded conversations between himself and Zaden. Cornejo contends that the tapes and the transcripts thereof were improperly admitted because the government had not laid the proper predicate for the introduction of a tape recording.

At trial, Cornejo objected to the evidence for failure to lay the proper predicate. Cornejo's counsel explained that his objection was that "we have not been shown under what authority they had to tape record these conversations." Cornejo did not specifically object to any failure to show that the tape recordings were accurate. Without such an

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[2] Although we assume *arguendo* that the district court wrongly excused Weiss for cause, we do not suggest that the court actually committed such an error. A district court has broad discretion in conducting *voir dire*. Even if an objection is made at the time, a district court's determination of actual bias on the part of a juror "'is reviewed for manifest abuse of discretion.'" *United States v. Bryant, 991 F.2d 171, 174 (5th Cir. 1993).*

objection, we review only for plain error. *See United States v. Greenwood*, 974 F.2d 1449, 1462 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2354 (1993).

In *United States v. Stone*, 960 F.2d 426, 436 (5th Cir. 1992), we held that "the trial judge retains broad discretion to independently determine that the recording accuracy reproduces the auditory experience." We noted that a proper predicate "generally requires the government to demonstrate (1) the competency of the operator, (2) the fidelity of the recording equipment, (3) the absence of material deletions, additions, or alterations, and (4) the identification of the relevant speakers." *Id.* We noted that "the list is not meant to command 'formalistic adherence' at the expense of the district court's discretion." *Id.*

In this case, as in *Stone*, a party to the conversations, Zaden, testified that the recordings and the English language transcripts were accurate and that there were no changes, additions, or deletions. Given this testimony and that the accuracy was not challenged, the district court did not err in the exercise of it's discretion. *See id.*

C.

Cornejo contends that the district court improperly limited his cross-examination of government witness Jay Zaden. The court would not allow Cornejo's counsel to go into specific areas of Zaden's past, including his name before it was changed to Zaden in 1985. The court ordered the government to present the matter *in camera*, with the presentation to include Zaden's affidavit, his tax returns, and related Customs Service files. The court received the information, except for the tax returns, then placed this information under seal, with the contents to be opened only by an article III judge because of danger to the witness. This information is contained, under seal, in the record on appeal.

The district court revealed some information related to Zaden's criminal activities and activities as a paid informant for the Customs Service. In *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3250 (U.S. Oct. 4, 1993), we held that we "review[] the district court's grant or denial of a request to disclose an informant's identity for abuse of discretion." *Sanchez* set out a three-part test: "The Court examines (1) the informant's degree of involvement in the crime, (2) the helpfulness of the disclosure to the defense, and (3) the Government's interest in nondisclosure." *Id.* Our review of the information provided under seal indicates to us that the district court did not err in withholding certain information.

D.

Finally, Cornejo asserts that he should have been given the reduction under U.S.S.G. § 5K2.0 that provides for downward departure for exceptional circumstances. He asserts that because there was an ambiguity as to whether he was entrapped into the first money laundering transaction, the district court should have given him a downward departure.

Cornejo has not alleged, nor is there any indication in the record, that a violation of the law has occurred by the district court's imposition of a sentence under the guidelines. Cornejo's assertion that the district court could have departed downward does not impose an obligation on this court to examine the district court's motives for not departing or choosing a lesser sentence. Unless there is a violation of the law, a sentence resulting from the proper application of the guidelines must be upheld. *United States v. Velasquez*, 868 F.2d 714, 715 (5th Cir. 1989) : *United States v. Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989), *cert.denied*, 495 U.S. 923 (1990).

AFFIRMED.

Supreme Court, U.S.
FILED
APR 22 1994
OFFICE OF THE CLERK

No. 93-1322

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLAVIO CORNEJO PUIG-MIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in excusing a prospective juror for cause.

2. Whether petitioner's Sixth Amendment right to confront the witnesses against him was impermissibly restricted.

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OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 9 F.3d 1546 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. The petition for certiorari was filed on February 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 371, and two counts of aiding and abetting money laundering, in violation of 18 U.S.C. 1956(a)(1)(A) and 18 U.S.C. 2. The district court sentenced petitioner to a total of 151 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. In February 1990, the United States Customs Service opened "Caribe Import-Export and Investments" as part of an undercover money laundering investigation. Customs Service agents recruited Jay Zaden, a Colombian national who had provided information to the Customs Service in the past, to operate the money laundering business. Gov't C.A. Br. 3.

Petitioner met Zaden in Miami, and after learning about Caribe, asked him what it could do for petitioner. Gov't C.A. Br. 3. Zaden replied that he could receive drug monies in Houston and funnel that money into South American bank accounts. He further explained that petitioner could be provided with private bank accounts if he so desired. Petitioner stated that his main business partner was in Cali, Colombia, and was "one of the biggest persons in the Cali [cocaine] cartel." *Ibid.* Petitioner showed Zaden a bank statement listing an account containing in excess of $100 million; the cartel had substantial amounts of cash to be laundered. Gov't C.A. Br. 3.

Petitioner, who expressed concern about being apprehended by the authorities, traveled to Houston with Zaden to see the money laundering operation. Zaden explained in detail the manner in which the money would

be laundered. Petitioner expressed his satisfaction and subsequently arranged a transaction with Zaden. After an initial attempt was aborted, Zaden and the undercover agents successfully laundered approximately $500,000 for petitioner. Several other transactions were arranged, and petitioner promised that the flow of money would continue and that the agents could expect significantly more than $500,000 per week. Gov't C.A. Br. 13.

Petitioner ultimately engaged in a number of other transactions with Zaden and the undercover agents, through which he laundered hundreds of thousands of dollars in drug money. In December 1990, the undercover operation was closed, and on October 7, 1991, petitioner was arrested. Gov't C.A. Br. 5-19.

2. During jury voir dire, the district court asked whether any prospective juror knew the defense attorney. One venire member, Cynthia Weiss, responded that she did. At a bench conference, Weiss stated that, about two years earlier, defense counsel had represented her son on charges of cocaine trafficking. C.A. Record Excerpts (R.E.) Tab G, at 1-39. She further informed the court that her son had pleaded guilty and had received a sentence of five to ten years' imprisonment, of which he served six months. When asked whether her son "got a fair shake by the prosecutors and the law enforcement," Weiss responded, "[n]ot by the district attorney and all, no." *Id.* at 1-40. When questioned further, she stated that she "just felt like they were really out to get" her son. *Ibid.* Weiss indicated that she believed that, given her son's age and the fact that this was his first offense, the prosecutor should have been more lenient. *Ibid.*

Weiss indicated that she understood that this was a money laundering case involving the proceeds from cocaine trafficking. She also stated that she could find the defendant guilty if the government proved its case

beyond a reasonable doubt, decide the issues based on the evidence, and follow the court's instructions. Nevertheless, Weiss hesitated when specifically asked by the court whether she could set aside her son's experience if she were selected as a juror in this case:

> COURT: Will you be able to put that [her son's experience] out of your mind if you are selected as a juror and base your decision in this case solely on the evidence you hear in this courtroom and on my instructions concerning the law?
>
> WEISS: I'm not sure. I'm just not sure about that.

R.E. Tab G, at 1-41 to 1-42. The prosecutor then asked "[b]ecause of your son being caught * * * do you think you would have some type of resentment that may be way down deep inside of you that may cause you a few problems?" *Id.* at 1-42. Weiss replied: "I still have a lot of resentment, yes. I do." *Ibid.*

Defense counsel attempted to rehabilitate Weiss, asking if she could set her resentment aside, hear the evidence, and "if the prosecutor proves his case to you beyond a reasonable doubt, * * * come with a verdict of guilty?" R.E. Tab G, at 1-42. She replied "[y]es." *Ibid.* The district court nevertheless found that, based on Weiss's demeanor in answering the questions, her experiences had compromised her impartiality. Accordingly, the court excused her for cause. The court explained that although defense counsel "attempted to rehabilitate her[,] * * * her candid answers to my questions indicated that she had difficulty being fair and impartial." *Id.* at 1-43.

3. At trial, the government offered the testimony of informant Jay Zaden. Zaden testified extensively concerning the undercover money laundering operation.

During cross-examination, defense counsel established that Zaden was a Colombian national who had been granted leave to remain in the United States by the government, that he had received some $5,000 for acting as an informant for the Customs Service, and that he started assisting the Customs Service approximately three and one-half years before the present case. When defense counsel asked Zaden whether the Caribe operation was his first money laundering case, the government objected on the grounds that "he may be inquiring into areas that impinge on the witness' safety." Gov't C.A. Br. 27. The court nevertheless permitted further questioning on these matters. *Id.* at 27-28.

Further questioning revealed that "Zaden" was not the witness's birth name and that he had engaged in prior criminal activity. Defense counsel sought to elicit Zaden's birth name, but the government objected. The government informed the court that it had disclosed all of Zaden's prior criminal activity and that disclosing Zaden's birth name, which he had changed to protect his own safety and that of his family, would jeopardize those interests. Gov't C.A. Br. 28. The court ordered the government to present the matter *in camera*. *Ibid.*

The court reviewed Zaden's affidavits, a report on his prior criminal activity, and the government's file on Zaden. Based on that review, the court weighed the government's interest in investigating future criminal activity and Zaden's personal security, on the one hand, against the defendant's interest in knowing Zaden's birth name or the location of his past criminal and informant activities, on the other. The court concluded that the balance favored nondisclosure of Zaden's identity. The court, however, disclosed to petitioner Zaden's criminal record, that Zaden had previously served as an informant, and that Zaden had received between $40,000

and $50,000 from the Customs Service for his work as an informant. The court expressly advised defense counsel that he could not ask Zaden where he had been arrested, but could examine him concerning the particulars of his crime. The court also permitted defense counsel to question Zaden about his tax returns and whether he reported his earnings as a confidential informant. Gov't C.A. Br. 29-31.

At trial, petitioner's counsel established that Zaden had received $54,000 for the operation involved in this case, that he had not reported his past earnings as a confidential informant on his tax returns, and that he had been convicted of shoplifting. Defense counsel also established that Zaden had been arrested for price tag switching, but that the case had been dismissed at the request of Customs Service agents. Defense counsel was also permitted to question Zaden about any matter pertaining to the present investigation. Counsel was prevented only from inquiring about Zaden's birth name and the location of his prior arrests and service as an informant. Gov't C.A. Br. 31-33.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court rejected petitioner's claim that the district court erred in dismissing venire member Cynthia Weiss for cause. Relying on *United States* v. *Prati*, 861 F.2d 82, 87 (5th Cir. 1988), the court found that even if the district court did err, "the error does not warrant reversal of [petitioner's] conviction."[1] Pet. App. 3a. The court explained that "[a]bsent a challenge to the jury's impartiality and an assertion that [petitioner's] rights were

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[1] The court made clear that it was not suggesting that error had occurred, and it reaffirmed the broad discretion of the trial court to determine whether a juror harbors actual bias. Pet. App. 3a n.2.

prejudiced," the exclusion of a juror, even if erroneous, does not violate the Sixth Amendment. *Ibid.*

The court also held that the district court had not improperly restricted petitioner's cross-examination of Zaden. Pet. App. 4a-5a. The court observed that "information related to Zaden's criminal activities and [his] activities as a paid informant for the Customs Service" was revealed to defense counsel. *Id.* at 5a. After reviewing other information about Zaden that the district court had placed under seal, the court concluded that the district court did not abuse its discretion in withholding that information from petitioner.[2] *Ibid.*

ARGUMENT

1. Petitioner argues that the trial court abused its discretion in excusing a prospective juror for cause and that the erroneous exclusion permitted the government an unfair advantage in selecting the jury. Pet. 4-10. He further contends that the Fifth Circuit in *United States* v. *Prati*, 861 F.2d 82 (1988), misinterpreted this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988).

a. The Sixth Amendment right to a jury trial guarantees the accused a trial by a panel of impartial jurors. *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The trial judge is primarily responsible for protecting the right to an impartial jury. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188-189 (1980); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 555 (1976). Since the question of the impartiality of an individual juror is "essentially one of

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[2] The court of appeals also rejected petitioner's claims that certain recorded conversations were improperly admitted into evidence (Pet. App. 3a-4a) and that he should have been given a reduction under Sentencing Guidelines § 5K2.0 for "exceptional circumstances." Pet. App. 5a. Petitioner does not renew either of those claims before this Court.

credibility, and therefore largely one of demeanor," the trial court's determination is due "special deference" (*Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984)), and may "be overturned only for 'manifest error'" (*id.* at 1031 (quoting *Irvin*, 366 U.S. at 723)). See also *Mu'Min* v. *Virginia*, 111 S. Ct. 1899, 1904-1906 (1991).

The trial court did not commit "manifest error" in excusing prospective juror Cynthia Weiss for cause. Weiss stated that she knew petitioner's counsel because he had represented her son on cocaine trafficking charges. She recounted her view that the prosecutor had not treated her son fairly and that the government was "really out to get" him. R.E. Tab G, at 1-40. When asked whether she could put aside her personal feelings and decide the case on the facts presented, she admitted that she harbored resentment against the criminal justice system and doubted whether she could set that resentment aside. Despite defense counsel's attempts at rehabilitation, the court concluded, based on its observation of Weiss's demeanor and her candid answers to the court, that she would not be able to render impartial service. Far from committing error, the trial court properly excused Weiss for cause. See 28 U.S.C. 1866(c)(2) (a juror may be excluded by the court on the ground that such person may be unable to render impartial jury service).

b. Contrary to petitioner's assertion, *United States* v. *Prati*, *supra*, is consistent with this Court's decision in *Ross* v. *Oklahoma*, *supra*. In *Ross*, the trial court failed to excuse a prospective juror for cause under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). The defense counsel therefore used one of his peremptory challenges to remove the venire member. The Court, however, "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. "So long as

the jury that sits is impartial," the Court explained, "the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ibid.* Because the defendant in *Ross* never claimed that the jury he received was biased, the Court found no Sixth Amendment violation. *Id.* at 85-88.

In *Prati*, the trial court erroneously excused a prospective juror for cause. As a result, the government effectively received an additional peremptory challenge. The Fifth Circuit, relying on *Ross*, explained that such an error would require reversal only in an exceptional case. Ordinarily, the improper removal of a prospective juror, without more, would not violate the Sixth Amendment, provided that the jurors who served on the panel were "impartial." 861 F.2d at 87. Nothing in that analysis conflicts with *Ross*. *Prati*, like *Ross*, focused on whether the defendant received a trial by an impartial jury. Since the defendant in *Prati* did not claim that the jury he received was biased, the court of appeals found that the removal of the venire member (even if error) was not a basis for reversing the defendant's convictions.[3] *Ibid.*

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[3] Petitioner suggests (Pet. 8-9) that the Court should apply the principle here that "the erroneous exclusion of even one venireman upon Government challenge merits reversal, regardless of the eventual makeup of the actual jury." In the cases cited by petitioner, Pet. 8, the Court held only that "the Constitution disentitles the State to execute a sentence of death imposed by a jury from which * * * prospective jurors [who were not irrevocably opposed to the death penalty] have been excluded." *Adams* v. *Texas*, 448 U.S. 38, 51 (1980); *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam). Petitioner did not face the death penalty here. Nor is this a case in which a juror was excluded on grounds that violate the juror's equal protection rights (such as the juror's race or sex). See *J.E.B.* v. *Alabama ex rel. T.B.*, No. 92-1239 (Apr. 19, 1994), slip op. 15 n.13. Outside of those settings, exclusions to which the

At bottom, petitioner's claim implies that he has the right to have a particular juror sit on his jury; the Sixth Amendment, however, guarantees the defendant only an "impartial jury." Petitioner has not questioned the impartiality of the jury he received; therefore, he has established no Sixth Amendment violation.

2. Petitioner argues that he was denied an adequate opportunity to cross-examine government witness Jay Zaden because the trial court refused to order the government to disclose certain information about Zaden. Pet. 10-17. Petitioner further asserts that the decision in *United States* v. *Sanchez*, 988 F.2d 1384 (5th Cir.), cert. denied, 114 S. Ct. 217 (1993), on which the court of appeals relied (Pet. App. 5a), conflicts with *Smith* v. *Illinois*, 390 U.S. 129 (1968).

a. In *Smith*, the Court reversed the conviction of a defendant who was prevented from eliciting the name and address of a witness testifying under a pseudonym. The witness was likely an informant for the police, and he was the only witness to a hand-to-hand drug transaction. 390 U.S. at 130-131. The Court held that the defense required the witness's identity in order to place him in his proper setting and thereby seek to challenge his credibility. *Id.* at 131-133.

Smith did not, however, hold that a witness's identity can never be withheld, regardless of the countervailing

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defendant might object do not prevent the jury from attaining the impartiality required by the Sixth Amendment. See *Holland* v. *Illinois*, 493 U.S. 474 (1990). Nor is there any conflict between this case and *United States* v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986) (Pet. 9). That case involved the systematic exclusion of National Rifle Association members in a firearms prosecution, following inadequate voir dire of whether such persons were biased. *Salamone* did not hold, or suggest, that a single erroneous exclusion, following adequate voir dire, would warrant a new trial.

interest in confidentiality. In *Roviaro* v. *United States*, 353 U.S. 53, 58-62 (1957), the Court explained that the government will often have a legitimate interest in protecting the identity of a confidential informant, despite the defendant's desire to elicit it on cross-examination. The Court held that the government's interest in nondisclosure must be weighed against the defendant's right to obtain information necessary to his defense. *Ibid.* Observing that the issue of whether disclosure should be made "depend[s] upon the particular circumstances of each case," the Court declined to establish a "fixed rule with respect to disclosure." *Id.* at 62. Instead, the Court left it to the lower courts to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Ibid.*

In implementing the balancing of interests required by *Smith* and *Roviaro*, the Fifth Circuit considers: "1) the informant's degree of involvement in the crime, 2) the helpfulness of the disclosure to the defense, and 3) the Government's interest in nondisclosure." *Sanchez*, 988 F.2d at 1391 (citations omitted). Petitioner takes issue (Pet. 15) with the second criterion, but that criterion is fully consistent with *Smith* (which focused on the defense need for the information in question) and involves precisely the type of balancing described in *Roviaro*.

Moreover, unlike the situation in *Smith*, the district court here investigated *in camera* Zaden's prior criminal history and the nature and extent of his prior undercover activities. The court supplied that information to defense counsel, who used it to cross-examine Zaden. Petitioner, therefore, was not denied the "most rudimentary inquiry" that was denied the defendant in *Smith*, 390 U.S. at 131; rather, he was given the informa-

tion necessary for the thorough cross-examination of Zaden.[4]

b. In any event, any error in the degree of disclosure afforded to petitioner was harmless beyond a reasonable doubt. See *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). Contrary to petitioner's suggestion, he was given wide latitude in cross-examining Zaden about the instant offense, his prior criminal activity, and his participation in earlier Customs Service operations. The court itself disclosed to defense counsel that Zaden had received between $40,000 and $50,000 for his service as a confidential informant in earlier cases. Petitioner's trial counsel established during cross-examination that Zaden was an alien who had been granted leave to remain in the United States by the government, that he had been working as a paid informant for about three and one-half years before the present investigation began, that he had received cash awards exceeding $50,000 from the Customs Service, and that he had failed to report most of that money on his income tax returns. Counsel also examined Zaden about his prior criminal activity and learned that "Zaden" was not the witness's birth name, but that it had been legally changed in 1985. The only restriction placed on defense counsel involved disclosure of Zaden's birth name, his current address, and the location of his prior criminal activity and participation as a government

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[4] Petitioner is not assisted by his reliance (Pet. 15) on *United States* v. *Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993). There, the court considered the government's obligations, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose prior felony convictions of an informant. Such disclosure was made here; this case involves the distinct question of whether the court properly determined that revelation of the informant's identity would endanger his safety.

informant. In light of the ample impeachment material brought out by petitioner on cross-examination of Zaden, any error in the court's refusal to require disclosure of the additional information was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

APRIL 1994